2000

Deterrence and white-collar crime : perceptions of antitrust attorneys

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DETERRENCE AND WHITE-COLLAR CRIME: PERCEPTIONS OF ANTITRUST ATTORNEYS

A Thesis

Presented to

The Faculty of the Department of Administration of Justice

San Jose State University

In Partial Fulfillment

of the Requirement for the Degree

Master of Science

by

Wendy Susanne Enloe

July 5, 2000

UMI Number: 1400657

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ABSTRACT

DETERRENCE AND WHITE-COLLAR CRIME: PERCEPTIONS OF ANTITRUST ATTORNEYS

by Wendy Susanne Enloe

The study measured antitrust attorneys' perceptions about the level of perceived risk of detection and the likelihood and deterrent value of particular punishments among potential antitrust law violators. Questionnaires were sent to 200 antitrust attorneys selected from the U.S. Department of Justice's Web site and 16 responses were analyzed for quantitative and qualitative information. The results were not statistically significant but support for incarceration and compliance programs is strong.

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INTRODUCTION

A major contribution to the field of criminal justice would be the identification of effective deterrence methods in combating white-collar crime. Many agencies would be assisted in assuring the effective deployment of resources for white-collar crime investigation and prosecution.

The principal aim of this study was to single out the individual sanctions that best deter antitrust law violations.[1] This research attempted to determine the level of perceived risk of detection (certainty) and likelihood of particular punishments (severity) among potential antitrust law violators. Certainty and severity was determined by measuring the perceptions of experienced antitrust lawyers regarding their clients. The study addressed questions such as: Are antitrust offenders aware of the risk of detection and are they aware of the possible punishments? Which punishments are most effective and are they likely to occur enough to deter offending?

Deterrence studies in the field of white-collar crime are convoluted by complex issues of individual and corporate motivations. This study addressed only the tip of the iceberg in white-collar deterrence research and merely attempted to address perceptions about punishment certainty and severity for one type of white-collar offender.

The study hypothesized that the certainty of detection for antitrust offenders is

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[1] An antitrust violation is defined as (a) violation(s) of Antitrust 15 U.S.C. 1-3.

low and many do not believe they will be incarcerated for their crimes. Furthermore, antitrust attorneys believe that a greater perceived threat of incarceration and probability of detection will deter antitrust crimes more effectively than greater threats of fines or alternative penalties related to antitrust crimes. Although the offenders' perceptions about likely detection and punishment may not be realistic, the perceptions theoretically affect their decision to offend.

Definition of Terms

Sutherland (1983) defined white-collar crime as "a crime committed by a person of respectability and high social status in the course of his occupation." There has been much debate and disagreement about the definition of white-collar crime (Benson & Moore, 1992, p. 255). Many researchers have found it difficult to produce a clear-cut definition, as exemplified at the Proceedings of the Academic Workshop "Definitional Dilemma: Can and Should There Be a Universal Definition of White Collar Crime?" (Helmkamp, J., Ball, R., and Townsend, K., 1996). There a group of participants settled on the following definition, "Illegal or unethical acts that violate fiduciary responsibility or public trust, committed by an individual or organization, usually during the course of legitimate occupational activity, by persons of high or respectable social status for personal or organizational gain" (Ibid, p. 351).

The 1997 Sourcebook of Criminal Justice Statistics includes crimes such as fraud in tax affairs, securities, insurance, health care, consumer affairs, computing,

commodities and banking as white-collar crimes. Antitrust violations are also listed as a white-collar crime (Maguire & Pastore, 1997). The U.S. Sentencing Commission includes fraud, embezzlement, forgery/counterfeiting, bribery, tax offenses and money laundering as white-collar offenses (Sourcebook of federal sentencing, 1998, figure E).

For the purpose of this study, the term "street crime" was intended to include violent crimes and drug offenses. The U.S. Sentencing Commission includes murder, manslaughter, kidnaping, sexual abuse, assault, bank robbery, and arson under violent offenses, and drug trafficking, drug communication facilities, and simple drug possession under drug offenses (Sourcebook of Federal Sentencing, 1998, figure E).

Antitrust offenses include crimes such as bid-rigging, price-fixing and market allocation.[2] These crimes generally occur when competitors conspire to eliminate competition and increase returns, thus causing serious economic harm to consumers.

The Extent of White-Collar Crime and Punishments

The presence of white-collar crime is significant. The 1998 U.S. Sentencing Commission's fiscal year statistics show that non-fraud white-collar criminals made up 7.1% of federal offenses, and fraud itself included 12.5% of offenders, resulting in more than one in five federal crimes falling under the white-collar crime category (Sourcebook of federal sentencing, 1998, p. 11).

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[2] See Table 1.

The cost of white-collar crime is believed to be substantial. It has been represented as the "fastest-growing area of criminal activity in the United States" with an annual price tag over $400 billion (Martin, 1998). Former Senator Philip Hart, Chair of the Judiciary Subcommittee on Antitrust and Monopoly, stated that as much as $200 billion has been diverted from the U.S. economy annually due to antitrust law violations alone (Meier & Salinger, 1995, p. 81). Although there appears to be a large amount of money at stake, currently there is not enough being done to prevent white-collar offenses.

It is common for antitrust offenders to be fiscally sanctioned but rarely imprisoned, like other white-collar offenders. In fiscal year 1998 antitrust offenders were fined a mean of $136,995 and a median of $50,000 (more often than other category offenders) and were least likely to pay no fine or restitution (Sourcebook of federal sentencing, 1998, table 15). Clinard and Yeager (1980) found a very low degree of imprisonment as a sanction in antitrust cases from 1975 to 1976 even when criminal intent and conspiracy were demonstrated. Only five individuals were incarcerated as a result of 118 antitrust cases in that time period. That has changed more recently. According to U.S. Sentencing Commission statistics, from fiscal year 1994 to 1998, white-collar offenders spent an average of 19.6 months imprisoned compared to 104.4 months for violent offenders and 83.4 months for drug offenders (Sourcebook of federal sentencing, 1998, figure E).

Characteristics of White-Collar Criminals and their Crimes

The idea that white-collar criminals differ from street criminals is supported by research by Benson and Moore (1992) who found that white-collar offenders tended to specialize in white-collar offending and were much less involved in crime than common criminals. They also found that less than half as many white-collar criminals had prior arrests. The white-collar criminal spent less time in jail, was able to afford better legal counsel, and experienced less stigma from his crime than his street crime counterpart, regardless of the amount of money or harm that occurred to the victims.

White-collar criminals were more educated than street criminals (Sourcebook of federal sentencing, 1997, table 8; 1998, table 8) and were more likely to be employed. Lott (1987) generally found that wealthier defendants may have had better case outcomes than their non-wealthy counterparts due to the purchase of superior legal services.

White-collar offenders, especially antitrust offenders, are demographically homogenous. In fiscal year 1997, U.S. Sentencing Commission data shows that convicted antitrust offenders were overwhelmingly white (72.7%), males (100%) over fifty years old (72.7%) and college-educated (63.6%) (Sourcebook of federal sentencing, 1997, table 4; table 5; table 6; table 8). These descriptive statistics are more homogeneous than average street crime offenders.

Characteristics of antitrust offenders and cases that fit the traditional stereotype of a white-collar crime were recognized and documented by Weisburd, Wheeler, Waring &

Bode (1991).[3] The antitrust offender was typically a middle-aged white male with stable employment in a white-collar job, often the owner of his company, and less likely to have prior criminal convictions (Weisburd et al., p. 48). The antitrust offenders tended to be married to their first spouses, owned homes, had children and at least some college education (Ibid, 1991, p. 48). They were well-off financially, had exemplary reputations in the community, were in "good" mental health, and did not have drug or alcohol problems. Generally, they were steadily employed and used their employment to commit their crimes (Ibid, p. 49-53).

Not only do antitrust criminals fit the traditional white-collar mold, the offenses themselves have been described as the "most elite of white-collar crimes" (Weisburd, et al., 1991, p. 24) and "virtually any American would regard (them) as quintessential white-collar crimes" (Ibid, p. 9). Eighty percent of the cases involved five or more conspirators and in 60% the total losses to the victims were more than $1 million (Ibid, p. 25). Antitrust offenses were patterned and repetitive, required a high degree of planning and organization, and were of an ongoing nature (Ibid, p. 39-40; Albanese, 1995, p. 3). The offenses were more likely to affect large numbers of victims and included wide

[3] The Weisburd, Wheeler, Waring & Bode study (1991) sampled antitrust offenders among other white-collar crime classifications, using pre-sentence investigation reports to collect their data. The subjects were offenders convicted by plea or trial in seven federal districts from fiscal years 1976-1978. Every federal antitrust offender during this time period in each district was included because of the infrequent nature of conviction (N=37).

geographic victimization (Weisburd, et al., 1991, p. 41-42). The offender usually had a position of authority within an organization and a motive for financial gain.

The decision to study the antitrust offender as a representative for the white-collar criminal was based on the notion that the antitrust offender fits the white-collar profile well. Antitrust violations are often the focus of special federal white-collar crime task forces and are the subjects of legal and scholarly discussion of white-collar crime (Weisburd et al., 1991, p. 10).[4] Antitrust criminals are few in number compared to other white-collar criminals, but antitrust violations are one of the main types of crimes falling under the traditional white-collar crime definition.

Individual Offenders Versus Corporate Offenders

A distinction was made in this study between individual and corporate offenders. Often times when an antitrust violation occurs, a single individual and/or group of individuals may be charged with a criminal offense. A corporation can also be separately charged with an offense but a person, not a corporation, forms criminal intent. A corporation can be held criminally liable for actions of its employees, and although the corporation may be subjected to fines and administrative penalties, it cannot be incarcerated. This is not a study on corporate deviance involving antitrust violations but a study specifically focusing on individual offenders. To date, there is no particularly

[4] The Antitrust Division of the U.S. Department of Justice is the primary law enforcement agency that investigates and prosecutes federal antitrust crimes.

appropriate research design for assessing the impact of sanctions applied to corporations (Hopkins. 1990) although such research exists.[5]

There are a number of factors affecting a person's decision to offend. and influences in the corporate setting play an active role in white-collar violations. Factors such as corporate policies. office culture, and industry structure can greatly affect a person's perception of right and wrong. Therefore, this research acknowledges the difficulty in making grandiose assumptions about general deterrence from the results.

Antitrust Offenders and Deterrence

Although this study focused on defense attorneys. prosecutors have unique experiences that can attest to the attitude of antitrust offenders. Some of the typical arguments that have been made by antitrust criminal defense lawyers to prosecutors are outlined below. This information is based on the personal experience of the author and names and details were omitted for confidentiality purposes.

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[5] This study does not ignore the fact that many antitrust offenders become so by existing schemes or organizational defects, but I chose not to open that can of worms. There are a few studies on corporate deviance showing that prosecutions have considerable impact on corporations, such as revocation of license to trade. fines. feared reaction of consumers. loss of morale, reputation and an unethical stigma (Hopkins. 1990). Hopkins suggested that the threat of prosecution and fine is sufficient for most companies to make changes to their corporate structure (such as compliance programs) to avoid further violations. But there are differing opinions in the literature. Simon (2000) suggested that the same corporations violate laws over and over again and existing prosecutorial policies are biased towards America's large and powerful companies. It is quite possible that deterrents in the corporate sense have some effect on individual decisions to deviate.

"My client is a well-respected, nice guy who contributes to the local community." Most antitrust offenders are well-respected members of their community. Why should that prevent them from being prosecuted? It would appear that something public, like a jail sentence, would do more damage to someone with good standing in the community than a street crime offender.

"How often do you prosecute cases with such a small volume of commerce?" Many antitrust cases may seem small when compared to some of the multi-million dollar international price-fixing cartels prosecuted recently. If you look at a $15,000 loss to a combined set of customers, it may not seem like much until you compare it to the same amount stolen by a bank robber or burglar.

"My client will pay the victims back the money." Is this the cost of doing business? If there is no criminal label or monetary penalty fixed to the crime, a business might be encouraged to engage in such behavior and take the risk of being caught. If the punishment does not match the crime, there is no deterrent value whatsoever.

Even as the blame gets shifted from person to corporation and vice-versa, fines cannot be the only punishment and increasing them is not efficient enough to deter this crime. If individuals believe they can get away with this behavior with minimal consequences, they will continue to commit violations. Calkins (1997) suggested that firms were easily able to pay increasingly larger fines which leads one to believe that the fines do not deter the behavior (Calkins, 1997).

"He wants to avoid the stigma of a felony, criminal record and jail time." This is a very scary concept to a well-respected member of the community and many will do everything it takes to avoid incarceration. This statement probably gives the strongest support to increasing incarceration of antitrust offenders and publicizing their convictions.

"He didn't know it was illegal." An educational and/or compliance program would take care of this. Culpability is important when prosecuting antitrust offenses, and more than one defendant has made the case that they just did not know the law. Additionally, most employees do not take responsibility for their actions, especially when it comes to antitrust violations. The corporate structure or "higher-ups" are blamed for the violations. The corporation may not want to expose itself to liability if the violation is discovered so they may "hand-over" individuals as scapegoats. The offender has an argument that he was committing the crime in the interest of the corporation, not for personal gain.

"He would prefer to do community service- he's got a wife and family." Why is this argument made? Antitrust offenders are more tied to their families and community and spending time incarcerated is incomprehensible to them. Community service is often reserved for first time offenders and misdemeanors, but with a crime that is so rarely detected and prosecuted, having community service as an option does absolutely nothing to deter.

The difficulty in investigation and detection causes major problems for deterrence in this field. Often law enforcement authorities find it difficult to gather evidence unless individuals and corporations are given immunity. This does not prevent violations either. Often lower-level employees are given immunity in order to provide evidence against the top executives of the company. Employees are not given incentives to report the behavior before detection especially if they are consistently immunized or given lax sentences.

"*He's got a clean record.*" Again, having no prior arrests is a common trait of antitrust offenders. In order to achieve general deterrence. they cannot be let off easily because the chances of being caught again are incredibly low.

In addition to these arguments, criminal defense attorneys know that a historical study of Antitrust Division case history would show major inconsistencies in sentencing and prosecution. Unfortunately, the deterrence problem will not improve until courts begin consistently imposing harsher sentences and sending a message of intolerance to this type of behavior.

Part of the consistency problem with antitrust law enforcement may be in its history. The first era of enforcement (1890-1905) was slight. It was established that a cartel agreement to divide the markets or fix prices was illegal per se and the federal government had the power of divestiture, but it did not help consumers much.

From 1906 to 1920 there were great results in divestiture decrees. Standard Oil

being the most well-known. From 1920 to 1938, the antitrust policy was continued with no substantial changes or accomplishments. The view during this period of time was that the large targets had already been taken care of. The Sherman Act's domain was expanded after Thurman Arnold took over the Antitrust Division in 1938. From 1938 to 1980, private remedies increased in importance and class actions began to be tried and won (Dewey, 1990).

When the Reagan administration took over in 1981, government antitrust enforcement resources were cut back and there were fewer private suits. Enforcement efforts were redirected from certain kinds of civil enforcement matters to criminal violations. All the changes were accompanied by public statements by government officials and media coverage that created a widespread public perception of less antitrust enforcement overall.

The 1982 AT&T consent decree that broke up the Bell system had "immediate/measurable consequences for consumers and workers" unlike any previous divestiture (Dewey, 1990, p. 10-11). There is much discussion about whether or not antitrust law has accomplished what it set out to achieve: "the suppression of monopoly" or "protection of competition" (Dewey, 1990, p. 10). Public confusion about the direction of antitrust policy and a perceived lack of prosecution may have caused an apathy towards the antitrust laws and may directly relate to widespread anti-competitive behavior in this country.

Under Clinton's liberal agenda, antitrust enforcement increased significantly since the Reagan area. The Antitrust Division's budget increased substantially and more impressive cases were prosecuted as well as the advent of record-breaking fines and headline-grabbing cases. The vitamins case brought a single $500 million fine to the Division and the Microsoft trial brought the most publicity to the Division since the Standard Oil case.

THEORETICAL MODELS

Previous Research on Deterrence Theory

Deterrence theory "implies a psychological process whereby individuals are deterred from committing acts only if they *perceive* legal sanctions as certain, swift, and/or severe" (Williams & Hawkins, 1986, p. 545). Most deterrence studies test behavior theories such as rational choice (Cornish & Clark, 1986; Klepper & Nagin, 1989; Grasmick & Bursik, 1990; Piliavin, Gartner, Thornton & Mastsueda, 1986; Paternoster, 1989) and social control (Reiss, 1951; Paternoster, Saltzman, Waldo & Chiricos, 1983; Williams & Hawkins, 1986; Tittle, 1980) but these studies predominantly address "street crime" offenses rather than "white-collar" offenses (Barak-Glantz & Huff, 1981, ch. 11; Simpson & Koper, 1992, p. 349). Much research regarding white-collar crime deterrence is inconclusive (Stotland, Brintnall, L'Heureux, & Ashmore, 1980; Simpson & Koper, 1992) and data on white-collar crime is difficult to collect making research inaccurate (Reiss & Biderman, 1980).

Some deterrence researchers argue that because white-collar crime is the more "rational" crime, the deterrence model works better than for "crimes of passion" (Chambliss, 1967; Gallo, 1998). White-collar criminals seem to be more sensitive to stigmatic punishment as well (Stotland et al., 1980). Benson & Moore (1992) lend support that the deterrence model applies differently to common criminals than white-collar criminals.

Becker (1968) was a proponent of the traditional expected utility model which was based on the theory that individuals have perceptions or formulate estimates about the likelihood of punishment and the magnitude of the punishment if imposed. Therefore, if the individual is rational, the product of certainty and severity of punishment is the cost of committing a crime. A rational actor will theoretically be deterred from committing a criminal act if the punishment is certain and severe enough.

Deterrence theory partially depends on an offender's perception of the risk of detection. Theoretically, if the probability of detection is high, an offender should be less inclined to commit a crime. Adversely, as the probability of detection decreases, a person might be more likely to take the risk. Antitrust crimes in general have large payoffs for the offenders. The owner of a small company has financial interests that are closely tied to the success of the company.[6] If he can prevent fierce competition from affecting the financial gains of the company, he is increasing his returns from the reduced competition.

If he perceives a low risk of detection, he may be more inspired to protect his financial interests by conspiring with a competitor.[7] Balsmeier and Kelly (1996) pointed

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6 Distinctions can be made between the relative size of a company and the reasons behind offending. Both break similar laws but an executive at a large company may do it because of organizational pressures and corporate culture rather than pure monetary gain.

7 Although antitrust crimes are generally committed by more than one person, it is possible for an individual to commit violation without help. "Complementary" bids on behalf of fictitious companies would be an antitrust offense that may be committed by an individual alone. It is widely believed that market concentration and lack of competitors breeds antitrust crimes and some industries are commonly plagued by anti-competitive behavior, such as the road-building or highway construction industry.

out that white-collar criminals may not realize what is at risk and that the financial incentives might outweigh any calculated risks in their mind. If the punishment outweighs the risk of committing the crime, a rational actor will presumably be deterred.

This study speculated that increased certainty and severity of punishment reduces the propensity for offending and the current *perceived* risk of detection and severity of punishment for the offense is low. If law enforcers could increase the odds white-collar criminals (in this study antitrust offenders) would be caught and furthermore guarantee imprisonment upon conviction, there would be a decrease in white-collar offenses. Because this theory is difficult to prove, the study aimed to describe the current level of certainty and severity offenders believe exists and hypothesized that it is relatively low.

This study strives to measure perceptions about whether an increase in certainty of punishment would better deter antitrust offenses and whether or not certain punishments are more desirable than others. The implications of these findings raises the issue of not whether or not fines or prison sentences need to be increased but if increasing the number of prosecutions/investigations and frequency of severe penalties would better deter. Furthermore, the study attempted to show that although individual criminal fines are assessed most often in these types of cases, the amount of the fine is not significant to these offenders. Thus, sending the individual to jail should be the most effective means of general deterrence for this crime.

Specific Deterrence Versus General Deterrence

The two types of deterrence frequently addressed in the criminal justice field are specific deterrence and general deterrence (Akers, 1997, ch. 2). Specific deterrence is commonly viewed as the theory that an individual who has been previously punished for an offense will refrain from committing another offense based on personal experience. General deterrence refers to the notion that a potential offender will refrain from committing a crime based on what he or she learns from the punishment of others who commit a similar offense.

There is much argument in the field about the difference in studying specific and general deterrence and whether or not they should be treated differently (Simpson & Koper, 1992, p. 348). This study focused on the concept of general deterrence, that one goal of antitrust law enforcement is to deter other potential violators from such conduct. Specific deterrence was not addressed because persons convicted of antitrust crimes are highly unlikely to recidivate due to the nature of the crime.[8] For example, a person convicted of price-fixing may lose his or her job that allows them to make pricing decisions, thus taking the opportunity to commit the crime away altogether. The loss of business relationships or licenses may further prevent a price-fixer from recidivating, rather than a change of heart, or a jail term. Additionally, because the probability of

[8] This idea is limited to individual offenders as recidivists as opposed to corporations who may recidivate through new agents.

detection is very low, an offender is highly unlikely to be caught twice. The fiscal year 1998 statistics from the U.S. Sentencing Commission show that 99.2% of the organizations sentenced under chapter eight had no prior record (Sourcebook of federal sentencing, 1998, table 52). For fiscal years 1994, 1995, and 1996, there were no new crimes committed by federal antitrust offenders terminating federal probation (Maguire & Pastore, 1996, p. 509; 1997, p. 479; 1998, p. 478).

The theory of general deterrence differs when applied to white-collar crime as opposed to street crime. The white-collar criminal is often more educated and financially stable than his street crime counterpart. There is research suggesting that white-collar criminals are more rational and responsive to the threat of punishment than street criminals. Stotland, Brintnall, L'Heureux, and Ashmore (1980) point out that if there is any deterrent effect of convictions, it would be best determined by studying the white-collar criminal. "Such offenders are assumed to be deterrable because they are believed to cooly calculate the material costs and benefits of committing a crime, which includes the stigma of a criminal conviction" (Stotland et al, p. 253). Fisse & Braithwaite (1983) dedicate an entire book to studying the impact of publicity on white-collar offenders. Gallo (1998) supported this argument by suggesting that prosecutions should be publicized to deter rational white-collar criminals from committing crimes.

Achieving Deterrence through Formal and Informal Sanctions

Much research on the subject has ignored the fact that deterrence can occur

through both formal (legal) and informal (extralegal) sanctions and that it may be difficult to sort out which deter best. Williams & Hawkins (1986) found that it is possible that the stigma of committing the offense and being arrested for it are separate. Bursik & Baba (1986) argued that it is possible some people may be strongly influenced by the threat of legal sanctions while others are influenced by the threat of shame or embarrassment. Grasmick & Bursik (1990) pointed out that deterrence research has generally ignored extralegal sanctions but believed variables such as moral beliefs and attachment to others are difficult to measure. Klepper and Nagin (1989) stated that informal sanctions should be studied in conjunction with formal sanctions because often it is difficult to determine which are most important in deterring.

Informal sanctions can be triggered by formal sanctions and it may be a problem to determine if the informal sanction (such as stigma, embarrassment, loss of job) may play a bigger role than formal prosecution. Stotland et al. (1980) argued that white-collar criminals are affected more by informal sanctions, especially stigmatic ones. There is a wide variety of consequences for committing an antitrust offense, formal and informal. In addition to the traditional formal sanctions associated with antitrust offenses, this study explored some of the informal punishments that threaten antitrust offenders to determine if they play a role in deterrence. However, the study did not attempt to measure the inter-relationships between the deterrent values of formal and informal sanctions.

Shaming White-Collar Criminals

Deterrence research addressing the concept of shaming poses interesting concepts to the field of white-collar crime. Some researchers argue that publically embarrassing punishments are effective and cost-efficient alternatives to imprisonment and can be best tested on white-collar criminals. Some think imprisonment for white-collar offenders should not be an option. Furthermore, Kahan and Posner (1999) argue that white-collar offenders serve short terms which offers no advantage in deterrence or incapacitation. Instead they suggest increasing fines and mandating public apologies. This study shows that even the offender's attorneys (those who are hired to defend the accused) believe that jail time will have a deterrent effect on offenders.

EMPIRICAL SUPPORT FOR THEORIES

Certainty

From this premise, this study surmised that the decision to commit an offense is a rational decision where the costs and benefits are calculated, therefore a low risk of detection would increase the danger of an antitrust violation. This idea is supported by research by Gibbs (1968) and Tittle (1969) who report evidence of a relationship between certainty of legal sanctions and crime rates. Past research on deterrence has also shown that a high threat of punishment leads to low offending. Stotland, Brintnall, L'Heureux and Ashmore (1980) found support for the hypothesis that an increase in the number of convictions and severity of punishment will decrease the amount of home repair fraud. They studied the increase in prosecutions of unlicensed contractors over a period of three to four years and then compared the relative occurrence of home repair fraud. It also is widely believed that individuals with a long history of offending perceive the chance of punishment to be low (Peterson, M. A., Braiker, H. & Polich, S. M., 1980; Chaiken and Chaiken, 1982).

This concept could apply to an antitrust violator who has been offending for years but has gone undetected due to the difficulty law enforcement encounters in detection. Paternoster, Saltzman, Waldo and Chiricos (1983) and Saltzman, Paternoster, Waldo and Chiricos (1982) demonstrated that perceptions of risk are not stable over time and illegal behavior in the past tended to reduce the level of perceived risk in the present.

Walker (1989, p. 113) argues that certain punishments, such as the death penalty, have no general deterrent effect, though. He somewhat concedes that in cases of domestic violence, subsequent arrests diminish for an offender after an initial arrest (touting specific more than general deterrence). He suggests that increasing certainty of arrest rather than increasing penalties may create more effective deterrence. Some empirical studies have found that certainty of punishment is often more important than severity (Simpson & Koper, 1992).

Block, Nold and Sidak (1981) found that increases in antitrust enforcement did have a positive effect on anti-competitive activity, but they also found that civil actions, like class action suits, were more effective in reducing price-fixing than criminal actions by the Antitrust Division.

Severity

Klepper and Nagin (1989) tax-noncompliance study posed questions both involving a hypothetical individual and their own behavior to determine perceived probability of detection and prosecution. The sample was comprised of middle-class adults who had high stakes in conformity. It was ideal in the examination of how stigma, attachment, commitment costs and direct costs related to criminal prosecution of white-collar offenders. They argued that both certainty and severity of punishment are deterrents and found that perceptions of risk and fear of criminal prosecution are significant in deterring in regards to tax noncompliance. Furthermore, informal

sanctions, socialization, and moral issues helped determine whether or not a person would offend. These findings suggest severity of punishment plays a crucial role in deterrence.

Klepper and Nagin's (1989) study focused on individuals upon whom criminal prosecution was likely to have an extremely adverse impact on their lives, which may limit generalization of findings because of the homogeneity of the sample. But as Grasmick and Bryjak (1980) point out, deterrence studies fail in accounting for differences among individuals in their personal reactions to the sanctions. Therefore, focusing on a homogeneous group is a strength of their study and this present one in relation to antitrust offenders. In fact, Nadar (1973) argued that jail terms have a significant impact on this group of offenders as they are "exquisitely sensitive to status deprivation and censure" (p. 53), a common thread for high-level corporate executives.

Studies in the corporate setting find less support for the deterrence theories (Braithwaite & Makkai, 1991; Simpson, 1992). Simpson & Koper (1992) found evidence that sanction severity inhibited corporations from re-offending antitrust laws, although they also discovered that the cultural and economic situation is more influential than sanction severity.

A major criticism of antitrust enforcement is that even when offenders are caught, they are not punished severely enough, if at all. Often offenders are granted immunity or reduced sentences because the crime itself is difficult to detect and/or past the statute of limitations. Many judges are reluctant to give harsh sentences to first time offenders and

usually levy fines instead.[9]

The penalties for antitrust violations have increased significantly over time. In 1890 when the Sherman Act was passed, the violation was a misdemeanor and the penalty was up to one year in jail and a $5,000 fine for individuals and corporations. The fine was increased to $50,000 in 1955 and in 1974 it became a felony (maximum incarceration went from one year to three) and the maximum fine increased to $100,000 for individuals and $1 million for corporations. The sentencing guidelines recommended base sentence was set at 18 months in 1977. In 1984, the individual fine was increased to $250,000 and the fine could be the greatest of that figure or twice the defendant's gross gain or victims' loss. In 1990, the maximum fine became $350,000 for individuals and $10 million for corporations (Calkins, 1997, p. 131).

In 1999, the Antitrust Division asked Congress to adopt even more severe fines for antitrust offenses. The proposal was to increase the maximum fine from $10 million to $100 million although no change was planned for individual punishments, which currently allow a maximum imprisonment of 3 years and fine of $350,000 or twice the gain from the crime or twice the loss of the victims (Berkman, 1997).[10] The Department believes the current sentencing guidelines tend to be more lenient towards larger

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[9] It has been suggested that judges have unique empathy towards white-collar offenders because they often emulate similar characteristics to most judges.

[10] The alternative fine is based on the financial harm (twice the company's pecuniary gain or twice the loss suffered by customers) and is used infrequently due to the difficulty in determining the amount (Berkman, 1997).

offenders because of the maximum limit set on fines. Global antitrust conspiracies usually exceed the $10 million statutory cap because the figure is based on the value of the commerce affected by the conspiracy. The request is also based on policies of the Antitrust Division to pursue larger antitrust conspiracies resulting in a reduction of prosecutions of smaller cases. This leads one to surmise that the Division believes that an increase in monetary penalties will deter antitrust offenses.

Research that supports the notion that an increase in the severity of punishment decreases offending is less prevalent than the certainty of punishment. In fact many researchers believe that perceived severity of punishment does not deter (Paternoster, 1987). Appelbaum & Erez (1984) demonstrated that the perception of the severity of punishment on criminal behavior depends on individual preference and demographic variations should be considered when conducting an analysis. Even so, Simpson & Koper's study (1992) showed strong support for the thesis of this paper in that improvement in enforcement activity and harsh criminal penalties do have a deterrent effect for corporate antitrust offenders (1992).

There is an argument that increasing penalties can lead to over-deterrence, a decrease in convictions, and a lower detection rate (Melamed, 1997). Over-deterrence occurs when the punishments for a particular crime are so severe that violations become more difficult to detect, companies spend much more than normal defending themselves, and courts become less likely to convict offenders under the harsher penalties. For

example. Melamed (1997) argued that increased penalties may deter legitimate conduct (in the antitrust model) or prompt destruction of evidence.

Such consequences rarely occur because the most severe punishment available to an individual (incarceration in the antitrust context) is seldom applied. Companies that apply for a special version of amnesty usually pay reduced fines or receive immunity from the offense. Increased fines may encourage companies to come in under amnesty programs in order to avoid large fines but they may be susceptible to outside litigation such as civil suits. A case against a corporation may rely on the company's disclosure of their own illegal behavior due to the difficulty of detection. A corporate compliance program may assist companies in making the decision to come forward.

The amnesty program offered by the U.S. Department of Justice's Antitrust Division offers incentives for companies to report their own illegal behavior before someone else does (Spratling, 1998). Often in large conspiracies, more than one company is allowed a special version of amnesty depending on the order they "come in" to the Division and report illegal behavior.

Section 2 R1.1 in the 1995 United States Sentencing Commission Guidelines Manual states that the "most effective method to deter individuals from committing this (antitrust) crime is through imposing short prison sentences coupled with large fines." In regard to general deterrence, it is the Commission's view that prison sentences and fines together make the most effective deterrent. That said, in fiscal year 1996, only 23.1% of

antitrust offenders received sentences including imprisonment. In 1997 it was 33.3% of offenders and in 1998 it was 44.4%. (Sourcebook of federal sentencing, 1996, table 12; 1997, table 12; 1998; table 12). Of those antitrust offenders who were sentenced in 1996, they spent a mean of 2.4 months incarcerated. In 1997 they spent a mean of 4.8 months and in 1998 a mean of 6.1 months (Sourcebook of federal sentencing, 1996, table 13; 1997, table 13; 1998, table 13). Hence imprisonment penalties appear to be increasing, but the statistics are misleading because of the relatively small number of convicted federal antitrust offenders passing through the system each year.

Celerity

Swiftness of punishment is not a common factor in white-collar cases. Offending may go on for decades, especially in the antitrust context, and investigations themselves can take years. The study did not address celerity because it is not pertinent and not attainable by current antitrust enforcement standards.

METHODOLOGY

Sample

A questionnaire was sent to a non-random judgmental sample of antitrust attorneys. A judgmental (or purposive) sample is the selection of an appropriate sample based on the researcher's needs (Hagan, 1997). The sample of attorneys was chosen purposefully because of the narrow field and the uncommon nature of the offense. The sample consisted of 200 defense attorneys (out of approximately 400) whose names appeared on the U.S. Department of Justice, Antitrust Division's Web site. The names and addresses of the attorneys listed on the filings were collected from the Web site at http://www.usdoj.gov/atr, under "Antitrust case filings." Names were selected from the cases under A - L and partially M (i.e. U.S. v Acme) when defense counsel were identified. The documents included stipulations, certificates of service, proposed orders and amicus curiae briefs. The civil and criminal cases listed on the Web site dated back to December 1994.

It was presumed that the attorneys were knowledgeable of antitrust issues due to their representation of clients in antitrust court documents. In order to maximize response to the questionnaires, it was important to target the respondent population as narrowly as possible.[11] This type of sampling, although far from creating a random, experimental

[11] For example, if a random sample of attorneys registered in the California state bar were targeted, the number of attorneys who are familiar with antitrust issues would be so small that the study would not produce valid results even at a high response rate.

sample set, has been used to predict future behavior or attitudes of the target population (Hagan, 1997, p. 137), although the findings may not be applicable to other populations of attorneys.

Apparatus

The questionnaire contained questions about the attorneys' antitrust experience including the number of years and approximate number of clients. It also queried the attorney's perception of the clients' expected likely occurrence of the following punishments for antitrust violations: Incarceration; individual criminal fine, restitution, and/or litigation expenses; probation, house arrest and/or community service; social disapproval and/or stigma of criminal conviction; loss of employment; corporate criminal fine and/or litigation expense; civil liability; involvement with the criminal justice system and/or investigation effects; industry-related punishments; other. The attorneys were asked to estimate the percentage of clients that were "not aware of penalty," believed the penalty is "not likely to occur," "likely to occur," or "don't know." Furthermore the attorneys were polled about their opinions as to the most effective ways to deter. The complete survey can be found in Appendix A. The study's basic approach was adopted because the respondent was making an estimate and narrowing the choices may reduce confusion and/or apprehension of filling out a survey.

To ensure a desirable response rate, the questionnaire was anonymous with a letter of introduction on university letterhead and allowed for the subjects to request the

results of the study separately from the questionnaire.[12] It was also relatively short at two pages. Enclosed with each questionnaire was a postage paid, self-addressed return envelope. To ensure effectiveness, the questionnaire was pre-tested among twenty antitrust attorneys at the Antitrust Division of the U.S. Department of Justice.

Procedure

The questionnaire was mailed in two waves: the first wave was sent on February 1, 2000 and the second wave was on March 1, 2000. Both waves consisted of 100 surveys and after the first mailing, responses that were valid, invalid, and undeliverable were tabulated to determine any flaws, including but not limited to method of attorney selection, questionnaire faults or any unforeseeable errors.

Problems and Rationale

Knowing when or even if an antitrust offense has occurred is complex. Although it is a well-established fact that most law violators believe their crimes will go undetected, antitrust crimes are fairly unique in that the offenses are frequently undetected by the victims, unlike street crime. It is easily apparent when money has been stolen from a cash register, but much more difficult to determine if the price one pays for milk is $.10 more that it should be due to a collusive arrangement between competitors. When antitrust crimes are discovered, it is likely because one participant has blown the

[12] Attached in Appendix B.

whistle, not due to undercover work by law enforcement officials. A large percentage of antitrust matters or investigations are dropped due to prosecutorial discretion, making records of indictment or conviction scarce (Hopkins, 1980, p. 200).

Although the importance of antitrust violations cannot be understated, there were only 15 guideline offenders for antitrust offenses in fiscal year 1996, 11 in 1997 and 11 in 1998 (Sourcebook of federal sentencing, 1996, table 3; 1997; table 3; 1998; table 3). For multiple reasons, in order to study this population it was necessary to go beyond the scope of convicted antitrust offenders. Due to the small population of convicted antitrust offenders it would be virtually impossible to identify potential violators or violators that have gone undetected. It would be even more difficult to survey or interview those individuals. Additionally, the study is interested in *probable* (as opposed to exclusively convicted) offenders who have obtained legal advice. This expanded the population and allowed the study to learn more about those who might have committed an offense even if they were never prosecuted for it.

The appropriate survey methodology for examining the deterrent effect of the perceived threat of legal sanctions is controversial. A survey of experienced antitrust attorneys is an effective way to assess the perceived deterrent value of the selected punishments. It was presumed these attorneys have had unique opportunities for contact with potential and convicted antitrust law violators and specialized knowledge of issues surrounding antitrust law violations.

Interviews or questionnaires have often been used to determine an individual's beliefs about if they would likely be arrested or what the punishment would be if they were caught for particular white-collar offenses (Paternoster. Saltzman. Waldo. Chiricos. 1983). (Klepper & Nagin. 1989) and (Tittle, 1980). Paternoster et al. surveyed 300 college students via questionnaire about involvement in five specific offenses in the past. One offense was writing a check with insufficient funds. Klepper & Nagin surveyed 164 Master's students with tax noncompliance scenarios measuring concerns about detection and chances of prosecution. among other things. Tittle (1980) asked respondents to estimate the likelihood of receiving a jail sentence if arrested.

One major problem with most deterrence studies is that they focus on student samples. pose hypothetical situations, and study minor criminal offenses (Williams & Hawkins. 1986). Because many deterrence studies sample student populations. it is questionable whether or not students' views can represent the general public. A strength of this study is that it focused on actual and/or potential offenders. more serious offenses. and real-life scenarios. This aspect allowed the findings to have greater external validity. The attorneys surveyed are familiar with the actual or potential deviants. as opposed to respondents who may have never contemplated or been in a position to break an antitrust law. The specific nature and familiarity of the target population with the offense strengthens the findings.

Some deterrence researchers have argued that the perceptions of an individual

may be unstable over time, thus causing unreliable results. For example, if a person has never committed a crime, they might answer questions on a deterrence survey in a particular way. Over time, they may have had a personal experience that changed their viewpoint, such as knowledge of someone who "got away with murder." This may drastically change their views on deterrence.

The circumstances around every antitrust violation are significantly different. Many violations affect commerce for long periods of time and others may have more short-term effects. Offenders are rarely caught, but if they are they usually do not have the opportunity to recidivate. Offenders might have agreed on prices just once in their career or they may have met with competitors on a regular basis. This study attempted to address this perception problem by focusing on a group of people who would be in a similar state of mind. The individual seeking legal advice about an antitrust matter is usually worried about a potential violation, large of small. The individual would be in a particular frame of mind, a frame of mind that the study is curious about and that the attorney assessed in this study. The crime is present in "real" terms for the individual. Compared to a sample of college students who are asked deterrence questions about crimes they never have committed, never would contemplate committing, or never had the means to commit, this group of subjects is ideal.

Even if perceptions changed over time, this study measured the perceptions of individuals who were all consulting an antitrust attorney due to some sort of anti-

competitive behavior. The attorneys were not a group of people making estimates based on hypothetical situations but bona fide attorneys who counseled real offenders or potential offenders. It can be presumed that these attorneys' clients are candid due to the attorney-client privilege, therefore making the results more reliable.

DATA ANALYSIS AND PRESENTATION OF FINDINGS

The non-response rate was 161 of 200, or 80.5%. Statistical tests of significance were not performed with the following data.

Summary of Data[13]

TABLE 2

Surveys	*Total*
Sent	200
Returned	39
Not returned	161

TABLE 3

Surveys Returned	*Total*
Returned	39
Relevant	16
Not applicable	7
Return to Sender	16

Surveys counted as "relevant" were those deemed to qualify for analysis in the results. Surveys "not applicable" were those responses that were thrown out because of irrelevancy. Due to the low response rate, the surveys were not weighted according to attorneys' antitrust applicable experience. If weighted for number of times counseled, the data would be completely skewed towards one attorney who answered over 50 times.[14] Because of the structure of the questionnaire, it is impossible to use years of experience to

[13] Complete raw data is attached in Appendix C.

[14] See Appendix C.

weigh the surveys because concurrent experience was not accounted for.

Sample Attrition

Out of 200 surveys sent, there were seven attorneys who returned surveys admitting their inexperience and irrelevance to the study. The invalid surveys consisted of attorneys who were either partners in the firm that filed the antitrust case (explaining their names on the briefs) or they were corporate counsel who assisted with the case, but were not antitrust attorneys and did not normally work on antitrust-related matters. Those questionnaires were omitted from the analysis.

The questionnaire was anonymous, thus no accurate attrition analysis could be done but judging from postmarks, handwriting, and return address labels, it was apparent that the responses came from all areas of the country where questionnaires had been sent. There did not seem to be a pattern among those who responded or did not respond. There were responses from corporate in-house attorneys and attorneys from law firms.

In addition to the seven surveys that were not valid, there were 16 surveys that were undeliverable by the postal service. Targeting attorneys names on the Web site caused a number of surveys to be returned to the sender or irrelevant. Attrition might be greatly reduced if a researcher was given access to the antitrust section of a large law firm and was able to conduct personal interviews (see Table 4).

A number of respondents had experience as more than one type of attorney or had concurrent experience in more than one category. Surveys with no antitrust counseling

experience were disqualified (see Table 5).

Respondent's Experience in Antitrust Law (N=16)

TABLE 4

Experience	*N*	*Mean # of years*
Prosecutor	5	5.8 years
Criminal Defense	11	20.4 years
Civil Work	14	19.5 years

Respondent's Counseling Experience (N=16)

TABLE 5

Experience (# times they have counseled clients)	*Number of Respondents*
1-10	5
11-20	4
21-30	5
31-40	0
41-50	0
more than 50	2

Attorney's Perceptions of the Rates of Detection Expected by Their Clients

The percentage of attorneys who believed their clients expected to be detected in the commission of an offense was averaged. Out of 13 responses. 22.3% believed their crime would be detected. Three did not respond to the question.

Attorney's Perceptions of Client's Expected Likelihood of Punishment

For each response to likelihood of punishment an average was calculated (see Table 6). Fifty-three point one percent of attorney's clients were not aware of or did not believe incarceration was likely to occur. This was the only category that all 16 respondents answered. Incarceration had the highest percentage (42.5%) in the not likely to occur column. The next highest was 31.7% in the individual criminal fine.

In the "likely to occur" column, attorneys perceived that 61.0% of their clients believed their company would be civilly liable for the antitrust violations and 60.0% believed their company would be fined. The highest percentage in this column was social disapproval/stigma of criminal conviction (62.9%).

Thirty percent of the clients were perceived as not knowing about industry-related punishments, such as debarment. This was the highest in the not aware of penalty column. The other two categories with a significant number of clients were perceived as not aware were the individual criminal fine (25.5%) and involvement with the criminal justice system/investigation effects (25.4).

TABLE 6

Punishment	% Not aware of penalty	% Not likely to Occur	% Likely to Occur	% Don't Know	n
Incarceration (Max. 3 yrs)	10.6	42.5	43.1	3.8	16
Indiv. Criminal Fine (Max. $350,000), restitution, litigation Expenses[i]	25.0	31.7	39.3	4.7	15[ii]
Corporate Criminal Fine / Litigation Expense	11.7	15.7	60.0	12.6	15
Social Disapproval/ Stigma of Criminal Conviction	11.8	20.7	62.9	4.6	14
Loss of Employment	16.0	24.3	50.4	9.3	15
Probation/ House Arrest/ Community Service	21.1	23.9	37.7	17.3	13
Civil Liability (exposure to lawsuits)	13.4	19.3	61.0	6.3	15
Involvement with Criminal Justice System/ Investigation Effects	25.4	23.4	45.4	5.8	13
Industry-related Punishments (i.e. Debarment)	30.0	19.3	28.2	22.5	14
Other (Please Specify)	80	10	10	0	1[iii]

i This row does not add up to 100% due to an error by one of the respondents who entered percentages equaling 110%.
ii Any result in the n column that does not equal 16 was the result of missing data. The only exception is in the Involvement with Criminal Justice System/Investigation Effects category where two respondents put question marks.
iii Only one respondent acknowledged the other category with Qui Tam/Whistleblower actions.

Qualitative Questions

A qualitative analysis was completed for each question; responses were counted.

The responses were analyzed for content and categorized according to each question.

Question 1: In your professional opinion, what sanction most effectively deters criminal antitrust violations? Eleven out of 16 respondents (68.8%) mentioned incarceration as the sanction that most effectively deters criminal antitrust violations.[15] This was the sanction mentioned the most, with fines second (25.0%). Third was loss of employment (12.5%). Other suggestions posed were humiliation, adverse affects on stock price, civil liability, well-publicized jail sentences, and disgorgement of profit incentive. One attorney said that there is no effective deterrent, as the crime is a cost of business.

Question 2: In your professional opinion, what could companies best do to deter criminal antitrust violations by employees? Most (14 of 16 respondents- 87.5%) mentioned some sort of education or information campaign to make employees aware of the law and consequences. Eleven of 16 respondents (68.8%) believed that corporate compliance programs were the answer for companies wanting to deter criminal antitrust violations.[16] Five (31.2%) mentioned that active internal monitoring/auditing and punishment was necessary. Four (25%) recommended that the company management set an ethical standard and lead by example. Other suggestions posed were tying sales and marketing staff compensation to volume, not margins; not supporting employees who are

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[15] Includes the terms jail, imprisonment, and prison.

[16] Includes the terms training, education programs and seminars.

charged with the behavior (e.g. not paying attorney's fees); and setting up hot lines and ombudsmen.

One attorney wrote "most didn't know they would be engaged in a crime." Another wrote, "Most clients are not aware of specific penalties, but believe they are likely to occur." On compliance programs, one response was "In the antitrust compliance programs I have conducted, newspaper articles regarding such individual punishments have gotten attendees' attention and generated many questions."

Question 3: In your professional opinion, what could federal law enforcement agencies best do to deter criminal antitrust violations? The most common response to this question was asking agencies to focus on hard-core, large violations (32.2%). Responses varied most in this category, but again the theme of incarceration (especially effective when made public) was prominent. The words "strong, aggressive, vigorous, consistent, firm and high-profile" were used by half of the respondents. One attorney stated that additional resources should be committed to investigation and prosecution and another wanted efficiency improved (citing that some grand jury investigations go on for years). Education again was mentioned frequently, as exemplified by one attorney who wrote "many people do not recognize an antitrust violation or appreciate the consequences, many believe it's only civil." All did not agree: one attorney felt it was not the job of federal law enforcement to deter, only to prosecute.

Test of Hypothesis

The study hypothesized that according to their counsel, the certainty of detection for potential antitrust offenders is low and many do not believe they will be incarcerated for their crimes. They study's author also argued that antitrust attorneys believe that a greater perceived threat of incarceration and probability of detection will deter antitrust crimes more effectively than greater threats of fines or alternative penalties related to antitrust crimes.

The study's results are not able to be tested for statistical significance due to the low response rate. Out of a sample of 200 attorneys, 16 valid surveys were received. This is eight percent of the population, a number not large enough to statistically analyze. Thus no tests of statistical significance were done and the results are described rather than statistically analyzed.

Although the results are not statistically compelling, some interesting conclusions can be offered. The average certainty of detection was calculated to be 22.3%, meaning that respondents perceived that 22.3% of clients believed an antitrust offense would be detected. This suggests that attorneys feel that most antitrust offenders do not believe their crimes will be detected. This also suggests the existence of a lack of certainty of detection in this area of misconduct and would support the hypothesis.

The data under incarceration for "not likely to occur" and "not aware of the penalty" was added to demonstrate the percentage of offenders do not believe or know

they will be incarcerated for their crimes (53.1%). This also supports the idea that the perceived severity of punishment is low.

Incarceration was cited by 68.8% of the attorneys as the most effective deterrent to antitrust violations, lending support to the hypothesis that incarceration is the most effective deterrent. This result backs the belief that antitrust offenders are not sentenced to prison frequently enough to deter this behavior. Additionally, attorneys felt that 42.5% of their clients perceived that incarceration was not likely to occur and another 10.6% were not aware of the penalty. Less than half (43.1%) believed that they would actually go to jail.

In comparison with other penalties, incarceration was cited most frequently as not likely to occur (42.5%). The next most frequent was individual criminal fine (31.7%). This lends very strong support to the concept that offenders do not believe they will be incarcerated for their crimes, even though it is a possible penalty for their behavior. If this is true, it makes a strong case for incarcerating more offenders more often.

Apparently, education is the second most important concept for deterrence of antitrust offenses. It appeared that a majority of attorneys believe education is more important than internal monitoring and many of them believe companies should focus on educating employees about the consequences of their illegal actions. Because 87.5% of respondents mentioned some sort of education to make employees aware of the law and consequences, they truly believe that their clients may be uninformed and education alone

would have significant deterrent value. Sixty-nine percent believed that corporate compliance programs were important, lending support to the idea that with appropriate measures, companies can protect themselves from the rogue employee.

Although increasing resources for investigation and prosecution of antitrust crimes was mentioned only once by the 16 respondents, what is more interesting is that attorneys believe that vigorous and aggressive enforcement will help deter antitrust violations and setting an example by prosecuting consistent, hard-core, and high-profile violations will make an enormous impact in a variety of industries. Twelve out of 16 respondents mentioned something along this line, lending support to the hypothesis that certainty of detection is an effective deterrent.

The two punishment categories with the highest percentage of clients who believed that the penalty was not likely to occur (incarceration and individual criminal fine) are the most commonly statutory penalties for violation of antitrust laws. It is interesting that attorneys perceive that their clients will not have to go to jail or be fined personally. On the other hand, 60% believe their company will be fined. This is the second highest percentage in the likely to occur column. The highest percentage in that column was 61.0% who believed their companies would be exposed to lawsuits/civil liability. This could indicate a lack of personal responsibility that attorneys perceived their clients to possess.

The significance of the "not aware of punishment" category is that an individual

criminal fine and involvement with criminal justice system are near the top at twenty-five percent and incarceration is at the bottom of the category at eleven percent. Since most are aware of incarceration but many do not believe it will occur, it poses an interesting question as to whether or not it is a deterrent. It may be that it is so unlikely to occur that its deterrent value is null. It is interesting to note, however, that the perceived most likely punishment to occur is the stigma of criminal conviction/social disapproval. Knowing this is very important in the examination of this population of offenders/ potential offenders.

Questionnaire Limitations

The questionnaire itself seemed to have flaws easily recognized upon receiving the responses. Many attorneys did not attempt to fill out the chart of percentages based on punishment. It seemed to take too much time and deliberation. One attorney wrote "I don't think my brain can do an accurate number-crunching of the permutations I have seen. For example- it is often not a black and white question whether a particular practice is in fact illegal. There are many nuances."

It appeared that the questionnaire should be more clear that probable offenders should be part of the attorney's estimate. One attorney wrote, "This is an ambiguous question. I'm not sure whether you're asking: a.) Have you counseled someone who has committed a violation? Or b.) Have you counseled someone about possible actions to take in a business, explain which are legal and which are illegal?"

In the punishments section, there was some confusion about the question on involvement with Criminal Justice System/Investigation Effects, which may need clarification. Additionally, many were not certain about what might fall under industry-related punishments.

Under the attorney experience question, it was difficult to determine total experience from the breakdown of prosecutor, civil, criminal defense and other. A total antitrust experience column should be added.

Other Limitations

The lack of response to the questionnaire makes it difficult to make many conclusions that would support to the hypothesis of the study. Sending a questionnaire to attorneys, many whom are partners in prestigious law firms, was risky because many do not have the time nor inclination to fill out a survey. A better method might have been to approach one or two large law firms that handle antitrust cases and ask for personal interviews. A larger and more robust set of quantitative and qualitative data might have been collected using this method. It is more difficult to decline a 10 minute personal interview than to throw away a piece of mail.

A qualitative study with this population appeared to work best. The most descriptive and useful information in the surveys was in the qualitative question section. Most (14) respondents counseled 30 or less clients on antitrust-related matters making anecdotal stories rather than percentages more useful.

By surveying the perceptions of attorneys rather than the offenders themselves, significant data is lost. It is important to realize that the perceptions are just that, and conclusions that are drawn have to be considered "second-hand." The information the survey is relying on also can date back years over an attorney's entire legal career. When asking respondents to remember events reaching far back it is quite possible that their views will be distorted and data will be skewed.

The lack of a comparison group makes it difficult to determine if there is a difference between antitrust attorneys and other white-collar attorneys. Comparison groups such as common criminal defense attorneys or attorneys representing individuals faced with other types of white-collar crime might be useful in a follow-up study.

Finally, it is difficult to determine if a low level of certainty and severity of punishment has varied over time due to policy implications or whether the new Antitrust Division agenda targeting large corporations has had a deterrent effect. The historical variance of sentencing guidelines and administrative antitrust policy has affected the number of investigations or inquiries and prosecutions in the Justice Department. Clinard and Yeager said that "antitrust enforcement has been susceptible to political considerations at a number of points in the process, hindering rational, effective, and equitable applications of the laws" (1980, p. 143).

DISCUSSION

Summary

The findings indicate that incarceration plays an important role in white-collar deterrence according to the attorneys that are involved in antitrust cases. The findings also demonstrate that much more needs to be studied in the area of antitrust deterrence and that methods such as the one used in this study can be refined to produce empirical results. The findings about two particular punishments suggest further work in this area. incarceration and social disapproval/stigma of criminal conviction. It is a strong statement that incarceration was the punishment cited most often as not likely to occur. It also is important to note that attorneys believed their clients were aware of the stigma attached to a criminal conviction.

Another interesting finding was the attorneys' belief that compliance programs and education are the answer to deterrence. Further exploration of the extent of compliance programs in operation is necessary. It is also intriguing that most attorneys mentioned incarceration which indicates that they believe in its deterrent value. On the other hand, the findings show that attorneys feel if their clients were more educated, less violations would occur, suggesting the problem with offending is ignorance, not rational choice.

Simon and Eizen (1993) suggested that the organizational structure of the corporation is much to blame. They described organizations as "amoral" and advocated

for an examination of corporate conformity. The believed that individuals within an organization do not act alone in their deviance. The anecdotal responses in the qualitative portion of this study support this idea as well. Attorneys suggested "not to promote activity," "well broadcast corporate ethic," and "company leadership must convey a sincere commitment to compliance, must demonstrate that commitment, and must threaten to discharge anyone who violates company policy."

Relevance to Prior Research

Attorneys believed their clients were sure of the stigma of a conviction, yet they were seemingly not deterred. More study needs to be done in this area because it is difficult to determine from the questionnaires whether or not offenders truly were deterred by this notion. It would appear that a separation between *potential* offenders and true offenders needs to be made in a follow-up study. Also, it is important to note the feelings of offenders before they receive an attorney's advice. Due to the study's limitations, a valid conclusion about the offenders' beliefs prior to counsel was impossible but it would be interesting to study offenders who had received compliance training and offenders who had not.

Prior research supports the notion that white-collar offenders do not believe their crimes will be detected. Mill's study (as cited in Simon & Eitzen, 1993, p. 71) supports the idea that the certainty of detection for antitrust offenders is low and many do not believe they will be incarcerated for their crimes. This study supports this concept

because the findings indicate only 22.3% of offenders (according to their counsel) believed their crime would be detected, thus they would avoid punishment.

Improvement of Study/Further Research

Although the study only reflected attorneys' perceptions about the way their clients think, the study opens doors for more interesting research concerning views of attorneys who defend street crime offenders. As discussed before, a questionnaire is probably not the best medium to do it, although staffing and cost need to be considered. If possible, individual qualitative interviews with a number of attorneys in a firm might produce better results for studying the white-collar offender. A control group for this study would have been fascinating (e.g. compare the antitrust attorneys' perceptions from this study with common criminal defense attorneys' perceptions to determine if common criminals have a great perceived certainty of detection and severity of punishment).

One interesting aspect of antitrust law enforcement is the difference in enforcement between the state and federal level. Some states have their own antitrust laws and the penalties vary. It might be a useful study to compare the number of violations (or alternatively, investigations) in a state with relatively minimal penalties, such as Kansas, to a state with maximum penalties, such as New York.[17]

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[17] Fines range from $1,000 in Kansas to $100,000 in New York (Brown & Singhvi, 1998, p. 495).

The number of international price-fixing conspiracies that have surfaced since then has grown exponentially and penalties have increased substantially. Also, significantly longer sentences have been handed down to defendants since 1989 (Calkins, 1997). Another area of interest to study would be the sudden and dramatic increase in fines levied against large corporations such as ADM for price-fixing. The effect of increased enforcement against large corporations could be studied since the announcement of the Office of the Attorney General in 1993 (DAAG John Clark in the address at the White-collar Crime Committee program as cited in Burney, Kim & Lauerman, 1995) that the Antitrust Division would look into criminal enforcement against larger corporations and extend enforcement internationally.

Social Policy Implications

On policy, lawmakers, enforcement officials, and prosecutors need to agree on issues surrounding the deterrence of white-collar offenders. The findings indicate that the laws that have been passed for antitrust offenders are not being used enough because most offenders or potential offenders either do not know they could be incarcerated or do not think incarceration is a possibility. Enforcement officials need to enhance current methods of detection (to raise certainty of detection) and prosecutors need to demand harsher sentences from judges. The current laws involve incarceration as a penalty: the problem is the current laws are not applied enough for a deterrent effect and offenders deem it highly unlikely they will be caught.

Conclusion

Incarceration is currently believed to be the most important deterrent for antitrust law offenders as opposed to other available penalties, according to this study's target population. It is important to keep this population in mind because presumably attorneys' interests are those of their clients, and the last thing attorneys want to see is someone like them go to jail. If the attorneys believe that the system is not working, then it probably is not. The majority of respondents believed that more needs to be done to deter their clients and *that alone* is enough evidence that the current system is not working.

It is still widely believed that antitrust offenders do not know the possible consequences of their actions and they feel it is unlikely their actions will land them in jail. The best way to combat this problem is the widespread use of educational programs aimed at white-collar offenders. Mandating and expanding compliance programs are probably the best thing a company can do to protect itself from becoming the target of a criminal antitrust investigation.

Further study in the field is one way to accomplish a broader base of understanding of the problem and discover new ways of approaching achievement of deterrence in the white-collar crime arena. The author strongly suggests further research and revamping of this study to produce statistically significant results.

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TABLE 1

ANTITRUST STATUTES ENFORCED BY THE ANTITRUST DIVISION

STATUTE	SECTION	DESCRIPTION
Sherman Antitrust Act, 15 U.S.C.	§ 1	Trusts, etc. in restraint of trade
Sherman Antitrust Act, 15 U.S.C.	§ 2	Monopolizing trade
Sherman Antitrust Act, 15 U.S.C.	§ 3	Trusts in territories or District of Columbia
Wilson Tariff Act, 15 U.S.C.	§ 8	Trusts in restraint of import trade
Clayton Act, 15 U.S.C.	§ 13	Discrimination in price, services, or facilities
Clayton Act, 15 U.S.C.	§ 14	Sale, etc. on agreement not to use goods of competitor
Clayton Act, 15 U.S.C.	§ 18	Acquisition by one corporation of stock of another/ premerger notification and waiting period

Reprinted in part from the statutory provisions and guidelines of the Antitrust Division.

APPENDIX A

Survey

This survey attempts to measure the perceived certainty of detection and punishment for individuals who have violated federal antitrust laws. (*Please note:* This survey is focused on **individual** behavior and does not attempt to measure corporate behavior).

Please describe your experience in the area of antitrust law.

☐ as Prosecutor No. of years _____
☐ as Criminal Defense attorney No. of years _____
☐ in Civil Work No. of years _____
☐ other (*please specify)* No. of years _____

In the exercise of your professional duties, have you ever advised/counseled an individual about a criminal violation of the U.S. antitrust laws? *(circle one) yes or no*

If yes, approximately how many times?
(circle one) 1-10 11-20 21-30 31-40 41-50 If more than 50, please specify: _____

Fill in the following chart with the percentage of your clients that believed the following penalties would occur if they were convicted of an antitrust violation.

Punishment	Not aware of penalty	Not likely to Occur	Likely to Occur	Don't Know
Incarceration (Max. 3 yrs)				
Indiv. Criminal Fine (Max. $350,000), restitution, litigation expenses				
Corporate Criminal Fine / Litigation Expense				
Social Disapproval/ Stigma of Criminal Conviction				
Loss of Employment				
Probation/ House Arrest/Community Service				
Civil Liability (exposure to lawsuits)				
Involvement with Criminal Justice System / Investigation Effects				
Industry-related Punishments (i.e. debarment)				
Other (*Please Specify*)				

We are interested in the perceptions of antitrust violators prior to your advice/counsel. What percentage of the individuals you counseled believed their crime would be detected? (*circle one)*
10 20 30 40 50 60 70 80 90 100

In your professional opinion, what sanction most effectively deters criminal antitrust violations? (*Your response does not necessary need to be reflected in the list above.)*

In your professional opinion, what could companies best do to deter criminal antitrust violations by employees?

In your professional opinion, what could federal law enforcement agencies best do to deter criminal antitrust violations?

APPENDIX B

Respondent Letter

San José State
UNIVERSITY

College of Applied Sciences and Arts
Administration of Justice
One Washington Square
San José, CA 95192-0050
Voice: 408-924-2940
Fax: 408-924-2953

February 3, 2000

Dear Respondent,

You have been identified as having previously worked on an antitrust-related matter by public court filings found on the U.S. Department of Justice, Antitrust Division's Web site. I am a graduate student in the Administration of Justice Department at San Jose State University in San Jose, California and conducting a study about general deterrence and antitrust law violations.

Please take a few moments to respond to this questionnaire and return it promptly in the self-addressed and stamped envelope provided. If you would like to receive the results of the study, please fill out your name and address on the last page and mail it in a separate envelope or e-mail your address to Wendy.Enloe@gte.net. All responses to the survey will remain anonymous.

Thank you for your time.

Sincerely,

Wendy Enloe
Graduate Student

APPENDIX C

Raw Data Tabulations

RAW DATA TABULATIONS

Experience

	Pros.	CD	Civil	Other	
1		25	35		
2			14	2	(judicial clerk)
3	7	13	13		
4		5	5		
5	6		19		
6	7	6	6		
7	4	25	25		
8	5		16		
9		25	25		
10		20	20		
11		18	18		
12				30	(outside lawyer and in-house counsel for a large
13		34	34		corporation)
14			13		
15		30	30		
16		23			
Ave.	5.8	20.36	19.5		
#resp	5	11	14	2	

Counseling x

	1 to 10	11 to 20	21 to 30	31 to 40	41 to 50	more than 50	
1			x				
2	x						
3			x				
4	x						
5						x	
6		x					
7			x				
8	x						
9	x						
10			x				
11		x					
12		x					
13			x				
14		x					
15						x	100's
16	x						
#resp	5	4	5	0	0	2	

Incarceration %

	Not aware	Not likely	Likely	Don't know
1	0	0	90	10
2	0	90	10	0
3	0	25	40	35
4	0	0	100	0

5	85	0	0	15	
6	20	70	10	0	
7	0	90	10	0	
8	10	10	80	0	
9	0	100	0	0	
10	0	25	75	0	
11	0	100	0	0	
12	20	60	20	0	
13	5	70	25	0	
14	30	40	30	0	
15	0	0	100	0	
16	0	0	100	0	
Ave.	10.625	42.5	43.13	3.75	
#resp	16	16	16	16	
Indiv. Crim. Fine %					
	Not aware	Not likely	Likely	Don't know	
1	0	0	90	10	
2	0	90	10	0	
3	0	75	0	25	
4	100	0	0	0	
5	85	0	0	15	
6	70	20	10	0	
7	0	0	100	0	
8	10	10	80	0	
9	0	80	0	20	
10	0	100	0	0	
11	0	0	100	0	
12	30	60	10	0	
13	50	10	40	0	
14	30	30	50	0	
15	0	0	100	0	
16					n/a
Ave.	25	31.67	39.33	4.667	
#resp	15	15	15	15	
Corp. Criminal fine %					
	Not aware	Not likely	Likely	Don't know	
1	0	0	100	0	
2	0	50	50	0	
3	0	0	75	25	
4	0	0	0	100	
5	85	0	0	15	
6	10	70	20	0	
7	0	0	100	0	
8	10	10	80	0	
9	0	50	0	50	
10	0	0	100	0	

11	0	0	100	0	
12	20	40	40	0	
13	0	0	100	0	
14	50	15	35	0	
15	0	0	100	0	
16					n/a
Ave.	11.667	15.67	60	12.67	
#resp	15	15	15	15	
Social Disapprov. %					
	Not aware	Not likely	Likely	Don't know	
1	0	0	100	0	
2	0	10	90	0	
3	0	60	0	40	
4	50	0	50	0	
5	85	0	0	15	
6	10	90	0	0	
7	0	0	100	0	
8	0	0	100	0	
9					n/a
10	0	10	80	10	
11	0	0	100	0	
12	20	40	40	0	
13	0	30	70	0	
14	0	50	50	0	
15	0	0	100	0	
16					n/a
Ave.	11.786	20.71	62.86	4.643	
#resp	14	14	14	14	
Loss of employment %					
	Not aware	Not likely	Likely	Don't know	
1	0	0	100	0	
2	0	50	50	0	
3	0	0	35	65	
4	50	0	50	0	
5	85	0	0	15	
6	80	20	0	0	
7	0	0	50	50	
8	0	0	100	0	
9	0	100	0	0	
10	10	60	20	10	
11	0	0	100	0	
12	15	15	70	0	
13	0	70	30	0	
14	0	50	50	0	
15	0	0	100	0	
16					n/a

Ave.	16	24.33	50.33	9.333	
#resp	15	15	15	15	
Probation %					
	Not aware	**Not likely**	**Likely**	**Don't know**	
1	0	0	100	0	
2	0	90	10	0	
3	0	0	0	100	
4					n/a
5	85	0	0	15	
6	80	20	0	0	
7	0	0	100	0	
8	0	0	100	0	
9	0	100	0	0	
10	0	70	20	10	
11					n/a
12	0	0	0	100	
13	50	10	40	0	
14	60	20	20	0	
15	0	0	100	0	
16					n/a
Ave.	21.154	23.85	37.69	17.31	
#resp	13	13	13	13	
Civil liability %					
	Not aware	**Not likely**	**Likely**	**Don't know**	
1	0	0	90	10	
2	0	50	50	0	
3	0	80	0	20	
4	0	0	100	0	
5	85	0	0	15	
6	80	20	0	0	
7	0	0	100	0	
8	0	10	90	0	
9	0	50	0	50	
10	0	10	90	0	
11	0	0	100	0	
12	15	15	70	0	
13	20	20	60	0	
14	0	35	65	0	
15	0	0	100	0	
16					n/a
Ave.	13.333	19.33	61	6.333	
#resp	15	15	15	15	
Involvement w/ CJS %					
	Not aware	**Not likely**	**Likely**	**Don't know**	
1	0	0	90	10	

2					n/a
3	0	20	80	0	
4	0	50	0	50	
5	85	0	0	15	
6	70	20	10	0	
7	0	0	100	0	
8	0	50	50	0	
9	0	100	0	0	
10					n/a
11	100	0	0	0	
12	15	15	70	0	
13	60	0	40	0	
14	0	50	50	0	
15	0	0	100	0	
16					n/a
Ave.	25.385	23.46	45.38	5.769	
#resp	13	13	13	13	
Industry punishments %					
	Not aware	Not likely	Likely	Don't know	
1	0	0	0	100	
2	0	50	50	0	
3	0	0	0	100	
4					n/a
5	85	0	0	15	
6	90	10	0	0	
7	0	60	40	0	
8	80	10	10	0	
9	0	100	0	0	
10	75	0	25	0	
11	0	0	100	0	
12	0	0	0	100	
13	70	25	5	0	
14	20	15	65	0	
15	0	0	100	0	
16					n/a
Ave.	30	19.29	28.21	22.5	
#resp	14	14	14	14	
Other %					
	Not aware	Not likely	Likely	Don't know	
1					
2					
3					
4					
5					
6					
7					

8	80	10	10	Qui Tam/ Whistleblower actions
9				
10				
11				
12				
13				
14				
15				
16				
% believed in detection?				
1	n/a			
2	10			
3	10			
4	80			
5	0			
6	10	or lower		
7	n/a			
8	n/a			
9	10			
10	0			
11	10			
12	20			
13	0			
14	40			
15	0			
16	100			
Ave.	22.308			
#resp	13			

APPENDIX D

Human Subjects Permission

San José State
UNIVERSITY

Office of the Academic Vice President
Associate Vice President Graduate Studies and Research
One Washington Square
San Jose, CA 95192-0025
Voice 408 924-2480
Fax 408 924-2477
E-mail jstudies@wahoo.sjsu.edu
http://www.sjsu.edu/

TO: Wendy S. Enloe
205 Best Ave.
San Leandro, CA 94577

FROM: Nabil Ibrahim,
AVP, Graduate Studies & Research

DATE: September 8, 2000

The Human Subjects-Institutional Review Board has approved your request for exemption from human subjects review under category "G" in the study entitled:

"Deterrence and White-Collar Crime:
Perceptions of Antitrust Attorneys"

This approval is contingent upon the subjects participating in your research project being appropriately protected from risk. This includes the protection of the anonymity of the subjects' identity when they participate in your research project, unless they are serving as a primary source, and with regard to any and all data that may be collected from the subjects. The Board's approval includes continued monitoring of your research to assure that the subjects are being adequately and properly protected from such risks. If at any time a subject becomes injured or complains of injury, you must notify Nabil Ibrahim, Ph.D., immediately. Injury includes but is not limited to bodily harm, psychological trauma and release of potentially damaging personal information.

Please also be advised that all subjects need to be fully informed and aware that their participation in your research project is voluntary, and that he or she may withdraw from the project at any time. Further, a subject's participation, refusal to participate, or withdrawal will not affect any services the subject is receiving or will receive at the institution in which the research is being conducted. This approval is granted for a one year period and resubmission to the board for annual review is required.

If you have any questions, please contact me at (408) 924-2480.